76-

Supreme Court, U. S.
FILED
JUL 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. ——

EDWARD KOLODZIEJ, pro se,

Plaintiff-Petitioner,

vs.

LOCAL 697, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendant-Respondent.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
(Civ. No. 71-H-333(2))

—

United States Court of Appeals for the Seventh Circuit.
No. 76-1033

PETITION FOR REVIEW ON CERTIORARI

EDWARD KOLODZIEJ, PRO SE
5616 West Fifth Avenue
Gary, Indiana 46406
(219) 949-1211

KEENAN PRINTING COMPANY (312) 372-0066 365

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page
Authorities	i.
Table of cases	ii
Statutes	iii
Petition for Certiorari	2
Judgment	2
Jurisdictional Statement	2
The Questions Presented	4
The Constitutional Provisions	5
Statement of the Case	6
Argument	7
Proof of Service and Affidavit	9
Appendix:	
Decision of United States Court of Appeals	A1
United States District Court, Memorandum of Decision and Judgment	A7

AUTHORITIES

CASES:

Local 3 IBEW (New Power Wire and Electric Corp.) 144 NLRB 1089 (1963) Enf. D. in pertinent part sub nom. New Power Wire and Electric, Inc. v. NLRB, 340 F. 2nd 71 (C.A. 2, 1965) A20

Local 25, Electrical Workers (Eugene Iovine, Inc.) 201 NLRB 531 (1973) A19

Local 761 International Union of Electrical Workers, v. NLRB, 366 U.S. 667, 81 S. Ct. 1258 (1961) A18

Local 861, Electrical Workers (Plauche Electric, Inc.) 135 NLRB 250 (1962) A18, A19

Local 861 IBEW (Brownfield Electric, Inc.) 145 NLRB 1163 (1964) A20
More Dry Dock Co. 92 NLRB 547 (1950) 7, A17, A18, A20
NLRB v. Teamsters Local 968, 225 F. 2d 205 (C.A. 5 1955) cert. denied. 350 U.S. 914, 76 S. Ct. 198 (1955) A18
Plumbers Local Union No. 307 (Meyers Plumbing) 146 NLRB 888 (1964) A20
Retail Fruit and Vegetable Clerks Union v. NLRB, 249 F. 2d, 1957 (C.A. 9, 1957) A18
Superior Derrick Corp. v. NLRB, 273, F. 2d 189 (C.A. 5 1960) A18
Swartz v. New York Central R. Co. 323 F. 2d 713 (C.A. 7, 1963) A9
Teamsters Local 859 v. NLRB, 229 F. 2d (D.C. Cir., 1955) cert. denied, 351 U.S. 972, S. Ct. 1025 (1956) . A20
Tucci v. International Union of Operating Engineers, Local 66, 316 F. Supp. 1127 (W.D. Pa. 1970) A11
United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130 (1966) A22
Yovakin v. Miller, 44 L. W. 4467 (U.S. March 30, 1976) A5
Zenith Radio Corp. v. Hazeltine Research Inc. 401 U.S. 321, 91, S. Ct. 795 (1971) A9

Statutes:

29 U.S.C. 152 (9) 2, 6
29 U.S.C. 158 (B) (4) A11, A16, A17, A19, A21
29 U.S.C. 187 ..... A4, A5, A7, A10
29 U.S.C. 158 (D) (4) 2
42 U.S.C. 1983 ..... A4, A5

Miscellaneous Authorities:

U.S. Constitution 5
Art. 1 Sec. 10 5
9th, and 14th Amendments 5
Permanent edition "Words and Phrases" 3, 8, 6
16A CJS 708 5

IN THE

Supreme Court of the United States

No. ——

EDWARD KOLODZIEJ, pro se, Plaintiff-Petitioner, vs. **LOCAL 697, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,** Defendant-Respondent.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. (Civ. No. 71-H-333(2)) — United States Court of Appeals for the Seventh Circuit. No. 76-1033

PETITION FOR REVIEW ON CERTIORARI

(A)

PETITION FOR CERTIORARI

The Memorandum of Decision and Judgment, of the District Court, and the Affirment of the Appeals Court are appended hereto.

JUDGMENT

Accordingly, it is the judgment of this court that the plaintiff take nothing by way of his complaint, and judgment is hereby entered in favor of defendant.

Entered this 19th day of November, 1975.

JESSE ESCHBACH
United States District Court

(B)

JURISDICTIONAL STATEMENT

The plaintiff-petitioner has been deprived of his constitutional rights, by the District Court by error, treating my case as if I had a "labor dispute", when the facts are, I had no labor dispute. I contract my work as an artisan.

In order to have a "labor dispute", according to the definition given in 152 U.S.C. (9), "the term labor dispute"

> includes any controversy concerning terms, tenure or conditions of employment, or, or concerning the association or representation, of persons, in negotiations, fixing terms or conditions of employment.

When this case arose, I had no employees; therefore, a labor dispute is not possible.

Under Unfair Labor Practices, 158 U.S.C. (d)(4),

> That for the purpose of this paragraph (4) only, nothing contained in such paragraph, shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product, or products are produced by an employer with whom the labor organization has a primary dispute.

I was not an employer at the instant of the "alleged dispute." Therefore, a labor dispute is not possible. Coercion does not constitute a "labor dispute."

Labor dispute, from permanent edition, "Words and phrases": Book 24

Page 38

> Term "labor dispute" as used in employment security law embraces concept of dispute over employee representation by union resulting in organizational strike.

Page 49

Where owner runs small business without any employees, an attempt to induce him to hire employees is not a labor dispute.

Page 50

Where owner of a small business seeks to avoid "labor dispute" as defined in statute relating to issuance of injunctions in labor dispute, by running his business without any employees, attempt to induce or coerce him to hire employees upon terms and conditions satisfactory to persons associated in such attempted inducement or coercion. is not a labor dispute.

Page 49

As long as owner continues to operate business without outside assistance "No Labor Dispute Exists".

A "Labor Dispute" cannot exist in business belonging to one person who employs no labor.

(C)

THE QUESTIONS PRESENTED

How could the district court find the plaintiff being under the jurisdiction of the defendant, hereafter called the union.

All the cases cited by the union are not in agreement with the case at hand.

How did the district court find that they were, since the plaintiff had no employees when the instant case arose.

What the union called "a dispute" on previous occasions was in fact coercion, and infringement on (the plaintiff's) constitutional rights.

The questions to be reviewed are, how the district court came to the decision that the plaintiff was under the union's jurisdiction, when in the Memorandum of Decision and Judgment, the court makes a reference to the plaintiff (page A12, line 18), although in the past he has had employees working for his firm, there were none employed at the time the instant case arose.

And (page A18, line 28) the picketing must disclose clearly that the dispute is with the primary employer.

The plaintiff is not a primary employer, and had no dispute with the union. See page (A12 line 15 to 18)

(D)

THE CONSTITUTIONAL PROVISIONS

Article I, Section 10, Right To Contract. Laws impairing the obligations of contract. (N.L.R. acts).

9th Amendment.

> Inalienable rights, not enumerated, like a right to be free from 23 years of coercion, by the union.

14th Amendment.

> Privileges and immunities shall not be abridged by law or otherwise; nor may a law or enforcement of same, deny any person equal protection (re: freedom of choice, association and contract).

Supportive authority (16A C.J.S. 708)

> That each individual shall have prompt and certain remedy by due course of law for injuries which he may receive in his person, property, or reputation, that he shall obtain such remedy freely without being obliged to purchase it.

(E)

STATEMENT OF THE CASE

The case has many facets, but the one that is presented for review is the district court's error, in law and fact, when the Moore Dry Dock Company case, 92 N.L.R.B. 547, was used to determine that the union had a right to picket the plaintiff, when the fact was established that the plaintiff had no employees the instant the case arose (page A12, line 18).

Therefore, the plaintiff could not have a labor dispute, as defined in 152 U.S.C. (9).

The cited cases were all clearly in error, and the statement that the plaintiff is an electrical contractor in Lake County, Indiana (page A12, line 11), doing business as Home Electric Co. The union is a labor organization representing electricians under a collective bargaining agreement with electrical contractors in Lake County, Indiana.

There are exceptions to that statement. The plaintiff had no agreement, with the N.L.R.B., or the union, at the time the instant case arose, or 20 years before the instant case arose.

From Book 24 permanent edition "Words and Phrases"

Page 48

ORDINARILY, a secondary boycott does not involve a "LABOR DISPUTE".

> The Plaintiff, not having any of the unions members, as employees, INVERSELY, made the unions action in this case, a secondary boycott.

(H)

ARGUMENT

The district court's decision was so contradictory as to call for an exercise of this court's power of supervision, especially in the statement that the plaintiff had no employees the instant this case arose. From page A12, line 19, of the Memorandum of Decision and Judgment.

The question arises: How could the plaintiff have a labor dispute with no employees?

Also from the Memorandum of Decision and Judgment, who had had disputes in the past (page A12, line 29), clearly the plaintiff could not have a dispute the instant this case arose, since (page A12, line 18), the court says, the plaintiff had no employees the instant this case arose.

Also, to make it more clear, the plaintiff had no employees at least 2 years before this case arose, and yet the court tried my case as if I had a crew of electricians working for me.

From page A17, line 29, the court also found that the picketing was primary, rather than secondary activity; then the Moore Dry Dock case was introduced (page A18, line 22), as follows. And under Test (2) (page A18, line 25) at the time of picketing the primary employer must be engaged in his normal business at the situs, (and page A12, line 19) there were none employed at the time the instant case arose. How could I be a primary employer? Again Test (4) (page A17, line 29) the picketing must disclose clearly that the dispute is with the primary employer.

The plaintiff was not a primary employer at the instant this case arose (see page A12, line 18).

From page A18, line 31, plaintiff concedes that the picketing here at issue was in compliance with the latter two standards. The short answer to this statement is: the plaintiff conceded nothing, . . . but insists that the picketing was unlawful and illegal.

In reference to the picketing.
From Book 38A permanent edition "Words and Phrases"

Page 63

> "A secondary boycott" is sometimes called an indirect illegal boycott, and exists where evil motive is found accompanied by unlawful acts, and it is defined as a combination to exercise pressure on customers, actual or prospective, to cause them to withhold their patronage through fear of loss or damage to themselves.

The plaintiff, not having any of the union's members, as employees, made the union action, in this case a secondary boycott.

Respectfully submitted.

EDWARD KOLODZIEJ, pro se
5616 West Fifth Avenue
Gary, Indiana 46406
(219) 949-1211

AFFIDAVIT

AFTER first being duly sworn upon his oath, Edward Kolodziej pro se attests and says that he has read all hereto attached, that he knows the contents well, and swears said contents to be true except those portions based upon the premise of information and belief, and he verily believes these portions to be true also.

EDWARD KOLODZIEJ, Pro se
5616 West 5th Avenue,
Gary, Indiana 46406
(219) 949-1211

PROOF OF SERVICE

After first being duly sworn upon his oath, Edward Kolodziej, pro se petitioner in the above captioned case, appearing in his own proper person, attests and says that on the date shown below true copies of all hereto attached were placed into a properly addressed envelope with sufficient first-class postage affixed thereto to insure mailing to Mr. Bernard Mamet, located at 327 South LaSalle Street, Chicago, Illinois, same being counsel for the respondent.

EDWARD KOLODZIEJ PRO SE

STATE OF INDIANA)
) SS.
COUNTY OF LAKE)

All hereto attached being subscribed and sworn to before me, a Notary Public, on this————day of————— A.D. 1976.

My commission expires:

Unpublished *Per Curiam* Order

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

May 6, 1976

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

EDWARD KOLODZIEJ, on behalf of himself and all others similarly situated, Plaintiff-Appellant, No. 76-1033 vs. LOCAL 697, International Brotherhood of Electrical Workers, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division Civ. No. 71-H-333(2) Jesse E. Eschbach, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

"Unpublished Order" not to be cited,
per Circuit Rule 28.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted April 22, 1976
May 6, 1976

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

EDWARD KOLODZIEJ, on behalf of himself and all others similarly situated, Plaintiff-Appellant, No. 76-1033 vs. LOCAL 697, International Brotherhood of Electrical Workers, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Indiana, Civ. No. 71-H-333(2) Hammond Division Jesse E. Eschbach, Judge

This matter comes before the Court on defendant-appellee's motion to dismiss or in the alternative, motion to affirm without oral argument pursuant to Circuit Rule 22. Because a review of the record and briefs in this action indicates that plaintiff-appellant has raised no substantial issue on appeal, defendant's Circuit Rule 22 motion should be granted.

Plaintiff, proceeding on appeal *pro se,* appeals from a judgment in favor of defendant entered by the district court after a trial without a jury. Plaintiff, who was represented by retained counsel in the district court, filed a four count complaint seeking damages against defendant in the amount of two million dollars. In the first three counts of his complaint, plaintiff alleged violations of Section 303 of the National Labor Relations Act, 29 U.S.C. § 187, arising out of claimed illegal secondary boycott activities of defendant. Though the district court found that plaintiff had established sufficient facts to vest the court with subject matter jurisdiction over these claims, the court found that plaintiff had failed to prove illegal conduct on the part of defendant union. The court found that the union's picketing was primary, pursuant to a lawful objective protected under the National Labor Relations Act. Count IV of plaintiff's complaint stated a pendent state law claim for malicious destruction of property. As regards this claim, the district court found that plaintiff had failed to establish with "clear proof" that defendant was involved in the alleged conduct. In a thorough and well-reasoned decision the district court set forth its findings of facts and conclusions of law supporting judgment for defendant.

A more elaborate statement of facts is not necessary to decide this appeal. Plaintiff does not contest the district court's findings of facts or conclusions of law. Rather, plaintiff argues that the district court erred by deciding this case under the National Labor Relations Act. It is plaintiff's contention that since he is an independent contractor and, therefore, not subject to the National Labor Relations Act, his rights should be decided under the Civil Rights Act, 42 U.S.C. § 1983, or the United States Constitution. Plaintiff claims that by deciding this case under the

National Labor Relations Act, the district court ignored plaintiff's status as an independent contractor, thereby requiring this Court to reverse the lower court's judgment.

In response to plaintiff's claims on appeal, defendant requests that this action be dismissed on the grounds that such claims are frivolous and present no issue for review. It is defendant's claim that plaintiff's *pro se* brief constitutes nothing more than an attempt to institute a new lawsuit at the appellate level. Because plaintiff never invoked 42 U.S.C. § 1983, the Ninth, or the Fourteenth Amendment as a basis for relief in the district court, defendant argues that plaintiff is barred from doing so on appeal.

The difficulty in discerning the issues, if any, for review must be attributed to the confusion with which plaintiff proceeds *pro se* on appeal. Insofar as plaintiff's briefs seek relief for the deprivation of constitutional rights, plaintiff raises no issue for review. As defendant noted, barring exceptional circumstances, a party may not assert for the first time on appeal claims for relief which were neither alleged nor considered by the lower court. *Yovakim* v. *Miller,* 44 L.W. 4467 (U.S. March 30, 1976).

Construing plaintiff's *pro se briefs* liberally, however, it is apparent that contrary to defendant's claim that plaintiff claims no error on appeal. plaintiff argues that the district court erred by deciding this case under the National Labor Relations Act. This claim becomes clear in plaintiff's reply brief where he states: "I am an independent contractor . . . under 29 U.S.C. § 152(3) excluded from the N.L.R. Acts, and so how could I be judged under it. . . ." Plaintiff raises a frivolous issue.

To the extent that plaintiff claims the National Labor Relations Act excludes from its coverage independent con-

tractors, plaintiff is correct. 29 U.S.C. § 152(3) provides: "the term employee . . . shall not include . . . any individual having the status of an independent contractor. . . ."

What plaintiff fails to understand, however, is that by filing a complaint alleging unfair labor practices on the part of defendant union, plaintiff put in question the legality of defendant's conduct, not his own. Since neither party disputes the applicability of the National Labor Relations Act to defendant union, the district court properly proceeded to determine whether plaintiff could prove the allegations in his complaint concerning the union's violation of the National Labor Relations Act.

There being no error apparent from the record, the judgment of the district court is hereby, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

EDWARD KOLODZIEJ, Plaintiff, v. LOCAL 697, International Brotherhood of Electrical Workers, Defendant.	CIVIL NO. 71 H 333 (2)

MEMORANDUM OF DECISION AND JUDGMENT

The above-captioned cause was tried to the court without the intervention of a jury on September 4, 1975 in Hammond, Indiana. The action is before the court upon the plaintiff's amended complaint, filed May 12, 1975, in four counts. The first three counts allege violations of Section 303 of the National Labor Relations Act, 29 U.S.C. § 187 (1970), arising out of claimed illegal secondary boycott activities of the defendant. Count IV of the amended complaint states a pendent state law claim for malicious destruction of property.

Also before the court is plaintiff's motion to reopen the evidence, filed subsequent to trial. That motion is denied for reasons explained later in this memorandum.

For reasons set out below, the court finds that plaintiff failed to sustain his burden of proof that the defendant conducted activities which constitute an illegal secondary boycott or that the defendant is chargeable with malicious destruction of plaintiff's property. Judgment will be entered accordingly in favor of the defendant.

The following will constitute the court's findings of facts and conclusions of law pursuant to Fed. R. Civ. P. 52 (a).

MOTION TO REOPEN CASE TO ACCEPT ADDITIONAL EVIDENCE

Following trial, plaintiff filed a motion to reopen the case to accept additional and allegedly newly-discovered evidence. That evidence consists of an affidavit of one Christian Breezhold, filed with a Justice of the Peace of Lake County, Indiana on May 12, 1970. The affidavit, denominated as one for probable cause, alleges that the affiant saw Robert Schumann, assistant business agent of the defendant union and a witness at the trial of this action, cut wires from outlets in a house under construction in Crown Point, Indiana. The motion does not reveal what further action, if any, was taken on this affidavit, i.e., whether Schumann was ever arrested or whether he was ever tried on this charge.

Plaintiff alleges that the affidavit should be admitted as it is credible and relevant to the issues in this case, citing as reasons therefor the following: (1) The acts alleged in the affidavit consist of destruction of electrical work, wich is also at issue in this cause; (2) The alleged acts occurred near the time of the destruction which took place in the present case; (3) The affidavit was given under oath by a disinterested party; (4) The affidavit impeaches and contradicts crucial testimony given by Schumann, who was

himself an interested party; (5) The affidavit is admissible as an exception to the hearsay rule under Rules 803(5), 803(8)(E), and 803(24) of the Federal Rules of Evidence. Alternately, the motion asks that Breezhold be subpoenaed and his testimony taken before the court.

Defendant objects to the admissibility of the affidavit on the grounds that the facts alleged therein are not relevant to this case, that it does not come within an exception to the hearsay rule, and that its admission contravenes the pre-trial order in this case.

A motion to reopen a case to take additional evidence is addressed to the discretion of the court, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795 (1971); *Swartz* v. *New York Central R. Co.*, 323 F. 2d 713 (7th Cir. 1963), and will be reversed on appeal only for an abuse of that discretion.

In the instant case, the court has determined that its discretion to reopen should not be exercised. The court notes that Breezhold was listed in the pre-trial order in this case as a witness for plaintiff. He was not called at trial, nor was there any explanation offered at that time as to why he was unavailable. Plaintiff now cites as reason for not calling him that he was reluctant to testify. Yet, plaintiff took no action to subpoena him, as he was entitled to do. Now, the plaintiff appears to have abandoned his reluctance. That abandonment comes too late. Litigants are entitled to their "day in court," but that "day" may not be extended indefinitely as plaintiff attempts to do here. This cause was set for trial four months before trial date. The court was ready, willing and able on that date to hear any testimony offered. Had this testimony been as crucial then as plaintiff now contends, he bore the responsibility of introducing it at that time. Under these

circumstances, there exists no reason for reopening this case to call Breezhold as a witness, and plaintiff's motion is denied.

Nor is there any better case made for the introduction of Breezhold's affidavit, even if, as plaintiff alleges, it was discovered after trial. Assuming *arguendo* that the affidavit would be admissible, there exist no grounds for preferring it over the direct testimony of Breezhold himself as to the acts alleged therein. The court must presume that plaintiff's reason for listing Breezhold as a witness in the pre-trial order was that plaintiff intended to elicit his testimony as to those alleged acts, there appearing no other connection between him and this case. Yet, as already pointed out, Breezhold was never called. Had he been called to testify there would have been no need for introduction of this affidavit, except, as plaintiff suggests, to refresh his recollection. That exception is, however, merely conjecture at this point. Thus, whether plaintiff discovered this affidavit before or after trial is irrelevant. He chose not to call the person who made it as a witness, and he is now bound by that choice. Accordingly, the motion to reopen the case to accept the affidavit of Breezhold is denied.

JURISDICTION OF THIS COURT

The amended complaint alleges that the first three counts arise under Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. § 187 (1970). The fourth count is a state law tort claim for malicious destruction of property.

Previously, this court denied defendant's motion to dismiss for lack of subject matter jurisdiction by order of July 31, 1975. In that order this court noted that the complaint technically failed to allege the requisite jurisdictional

facts for a cause of action under Section 303, but denied defendant's motion to dismiss upon the express condition that plaintiff prove those facts at trial. The court finds that plaintiff has complied with that condition and that it has jurisdiction of this cause of action.

Section 303 provides a private cause of action for individuals injured by a labor organization's violation of Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4) (1970). The pertinent language of Section 303 reads:

> (a) It shall be unlawful . . . in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason [of] a violation of subsection (a) . . . may sue therefor in any district court.

Section 158(b)(4) provides in relevant part:

> It shall be unfair labor practice for a labor organization or its agents . . . (4) (i) . . . to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in . . . a refusal . . . to use, manufacture, . . . or otherwise handle . . . any goods . . . or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is — (A) forcing or requiring any employer or self-employed person to join any labor or employer organization. . . .

Under these statutes plaintiff must show that those induced not to contract with him were in commerce or an industry affecting commerce within the meaning of the Act. *Tucci* v. *International Union of Operating Engineers, Local 66*, 316 F. Supp. 1127 (W.D. Pa. 1970).

The evidence at trial established that James Pappas, with whom plaintiff had a contract, was in commerce as well as in an industry affecting commerce, i.e., the construction industry. Thus, plaintiff has met his burden of proof that this action arises under Section 303 and that this court has jurisdiction pursuant to 28 U.S.C. § 1331. The court further finds that it may properly exercise pendent jurisdiction as to plaintiff's state law tort claim. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966).

THE FACTUAL BACKGROUND

Plaintiff, Edward Kolodziej, is an electrical contractor in the Lake County, Indiana area, doing business as Home Electric Company. Defendant, Local 697, International Brotherhood of Electrical Workers ("the Union"), is a labor organization representing electricians under a collective bargaining agreement with electrical contractors in Lake County, Indiana.

Plaintiff conducts his business as a sole proprietorship. Although in the past he has had employees working for his firm, there were none employed at the time the instant case arose.

On January 9, 1970, plaintiff entered into a contract with James Pappas to supply and install electrical wiring in a twelve-unit apartment building in Gary, Indiana. As a part of this contract, plaintiff agreed with Pappas that if there were any "labor troubles," Pappas would have the option to rescind. This cancellation option, however, was not reduced to writing as were the other provisions of the contract. Its inclusion was the result of concern on Pappas' part in dealing with plaintiff, who had had disputes in the past with the defendant union in this action.

Work commenced on the installation of the wiring on January 12, 1970, and proceeded for a period of three to four weeks without incident. At some point during this period (the evidence did not establish the exact date), Robert Schumann, assistant agent for the Union, ascertained from a visit to the job site that plaintiff was working there.

On the basis of that visit the Union's attorney sent plaintiff a letter on February 2, 1970. The letter related that the Union believed that plaintiff was "undermining the entire area by failing to meet the prevailing wages and conditions." It went on to advise plaintiff that the Union intended to protest his employment on the Pappas project by "peaceful picketing and handbilling" directed solely against him.

On February 6, 1970, the Union began peacefully picketing plaintiff at the job site, while he was engaged in his normal work there. The picket sign carried the following inscription:

> "HOME ELECTRIC COMPANY FAILS TO MEET PREVAILING WAGES AND CONDITIONS. This notice is addressed only to the public. It is not addressed to any employers or employees, nor is anyone asked to cease doing business with anyone. Please read the handbill which spells out the purpose of patrolling. Local 697, IBEW AFL–CIO."

Accompanying the picket sign was a handbill, distributed at the job site, which read:

> "PROTEST
> "TO THE PEOPLE IN THE VICINITY
>
> "You will note that the job site at 58th and Connecticut Street is being peaceably patrolled by one or two persons. This is because the electrical work is being done by Home Electric Company. We feel that

the activity of the Home Electric Company serves to reduce standards of living in the areas where he works. As a union we are, of course, pro-union but this is not why we are picketing. True, we always like to see members of the union employed not only because they are our members, but also because we know that as the result of their intense training and experience and the completion of a four or five-year apprenticeship program these men are qualified to give the finest service and perform work with the expert craftsmanship which they have learned. But we have an additional interest in our area. We believe it is our obligation along with other residents of the area to maintain a certain standard of living. A standard of living comes from wages and conditions and we believe the wages and conditions which permit the maintenance of our standard of living and your standard. are those which prevail in the general area. Once these wages and conditions which prevail are reduced this means that the standard of living is reduced, and it is not only reduced for the mechanic, but it is reduced in the entire community as well because the merchant, the professional man, and anyone whose business is dependent upon the prevailing wage of the mechanic is hurt when prevailing wages are not met. And. this is the only reason we are picketing. Home Electric is not meeting prevailing wages and conditions and this, in our opinion, represents a threat to the entire community.

"This notice is addressed only to the public. It is not addressed to any employers or to any employees. There is no intent or attempt to induce or encourage employees of any employer, or any person to engage in a refusal to work, transport, or otherwise handle or work on any goods, materials and so on. No one is requested to cease performing any services. No one is requested to cease doing business with any one person. There is no intent to have any particular work

assigned to anyone, nor is there an intent to seek recognition or start bargaining.

"We believe that the people in this area should be familiar with what is going on and that is the sole purpose of patrolling.

LOCAL 697, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFFILIATED WITH AFL–CIO"

Picketing and handbilling continued up to and including March 4, 1970,[1] and was restricted to the Pappas project. There was no picketing at plaintiff's regular place of business or at other locations where plaintiff was working. During this period plaintiff completed "roughing in" the electrical work on the project. (By that term is meant the installation of conduit, electrical panels, electrical socket boxes, etc.). This preliminary stage of the work was substantially completed on or about February 15, 1970. Thereafter, plaintiff worked at the job site sporadically until

---

1. The evidence was in conflict as to the exact date of the termination of the picketing and handbilling. Plaintiff testified that after his completion of the "roughing in," he visited the job site on regular occasions, observing pickets there on each occasion for at least two weeks beyond the 16th of February. Defendant's witness Schumann stated that the picketing ceased on February 23, basing his testimony on pay stubs to the pickets involved.

James Pappas, although uncertain as to the exact date of termination, testified that he observed pickets on the job site the day before the destruction of plaintiff's work was discovered on March 5. Since Pappas was, in effect, the only "neutral" witness to testify as to the date of termination of the picketing, the court chooses to accept his testimony as to that issue.

March 2, 1970. In all, he worked at the site for a total of approximately eleven hours during this two-week period. On some days he did no work at all, but merely stopped by the site to check the progress of the other subcontractors. On others, he worked an hour or two, depending on the stage of completion of other work.

At no time during the picketing did any picket encourage anyone to leave the project, nor did any of them leave the site because of the picketing. The only coercive activity which occurred was an anonymous call to Pappas, during which the unknown caller warned Pappas to "get rid" of plaintiff.

Sometime during the night of March 4 or the early morning of March 5, an unknown vandal destroyed much of the electrical work on the project. While plaintiff's rough wiring appeared to be the primary target of the vandalism, some other carpentry work was also vandalized. Following the destruction, Pappas elected to exercise his option to rescind the contract with plaintiff, and on March 9 terminated their agreement. Although according to plaintiff's estimate he had completed approximately 70% of the work on the project, Pappas paid him only $4,500 on the total contract price of $9,000.

Since the time of the facts above-recited, plaintiff has been unable to secure what he termed "large jobs," but instead has been limited in his activities to small residential electrical work.

SECTION 8(b)(4) VIOLATIONS

Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), prohibits what are commonly referred to as "secondary activities" directed toward persons other than the individual with whom the labor or-

ganization has a dispute. Before a violation is proved, there must be shown both an illegal objective and its attempted attainment by actions which the statute proscribes. Important here, the statute exempts from its proscription primary strikes and picketing directed against the party with whom it has a dispute. This exemption has particular relevance in cases involving a "common situs" as does the case at bar.

The complaint alleges that the Union's actions were carried out with the proscribed objectives as their goal. In particular, Count I alleges that the Union induced and encouraged employees of Pappas or of his contractors on the job to refuse to perform their normal services with the objective of forcing plaintiff to join the Union in violation of Section 8(b)(4)(ii)(A). Count II alleges that the Union "harassed, threatened and coerced" employers of the plaintiff with the object of forcing them to cease doing business with him in violation of Section 8(b)(4)(ii)(B). Count III of the amended complaint alleges that the Union "maliciously, willfully and intentionally" destroyed plaintiff's work with the objective of threatening or coercing plaintiff's employers to cease doing business with him.

Defendant denies that its objectives were those alleged by plaintiff. Further, it denies that its agents or members were responsible for the destruction of plaintiff's electrical work. Moreover, it claims that its picketing of the Pappas job site was within the proviso to Section 8(b)(4), that is, that it was primary and thus not prohibited. In support thereof it contends that the picketing in all aspects complied with the standards of the *Moore Dry Dock Co.* case, 92 N.L.R.B. 547 (1950), and that thus the court should find from this compliance that the picketing and handbilling was primary rather than secondary activity.

A. THE PICKETING

In *Moore Dry Dock* the National Labor Relations Board laid down a four-part evidentiary test to determine whether a labor organization's picketing activities were primary or secondary. This test has subsequently been followed by the Board, has gained acceptance by numerous circuit courts of appeal, *see, e.g., Retail Fruit & Vegetable Clerks Union* v. *NLRB,* 249 F. 2d 1957 (9th Cir. 1957); *NLRB* v. *Teamsters, Local 968,* 225 F. 2d 205 (5th Cir. 1955); and has received the imprimatur of the Supreme Court, *see, e.g., Local 761, Int'l Union of Elec. Workers* v. *NLRB,* 366 U.S. 667, 81 S. Ct. 1285 (1961).

Although initially the test was applied with unswerving rigidity, *see, e.g., Superior Derrick Corp.* v. *NLRB,* 273 F. 2d 891 (5th Cir. 1960), later decisions have recognized that the standards set down in *Moore Dry Dock* are to be applied less mechanistically since they were designed to be evidentiary aids, not concrete tenets of labor relations law. *Electrical Workers, Local 861 (Plauche Electric, Inc.),* 135 N.L.R.B. 250 (1962).

The evidentiary standards of *Moore Dry Dock,* used to determine whether activities are primary, and thus protected, or secondary, and thus prohibited, are as follows: (1) the picketing must be limited to times when the situs of the dispute is located on the secondary employer's premises; (2) at the time of the picketing the primary employer must be engaged in his normal business at the situs; (3) the picketing must be limited to places reasonably close to the location of the situs; and (4) the picketing must disclose clearly that the dispute is with the primary employer.

Plaintiff concedes that the picketing here at issue was in compliance with the latter two standards. He claims,

however, that the picketing violated the first two standards and thus should be found to be secondary rather than primary activity.

As to these standards, plaintiff contends that the picketing continued after he had completed his "roughing in" on February 15, and therefore was not limited to times when he was performing his normal work on the premises of the secondary employer. Defendant asserts that although picketing may have occurred at times when plaintiff was not physically present at the job site, nevertheless, no violation should be found since plaintiff's absences were temporary and his work there not having been completed. The court finds there is ample authority for defendant's position. In *Local 25, IBEW (Eugene Iovine, Inc.),* 201 N.L.R.B. 531 (1973), the National Labor Relations Board reversed the finding of the Administrative Law Judge that a Section 8(b)(4) violation had occurred because pickets were present at the job site at times when employees of the primary employer were absent. The Board found on facts nearly identical to those here that the primary employees' absence was "plainly temporary" since during the entire duration of the picketing, the primary employer's work remained in an uncompleted state; that the electrical work of the primary was done on an intermittent basis, depending upon the progress of other work on the site; and that neither the primary employer nor the union had any way of knowing in advance when the primary's employees would return to the job site to continue their work, nor could the union foretell when the employees, though absent at particular times, would return *instanter.* The Board also noted that the record was devoid of any other evidence that would justify finding a Section 8(b)(4) violation. Upon these facts the Board held that picketing dur-

ing the absence of the primary's employees did not in *itself* establish an unlawful objective. *See also, Local 3, IBEW (New Power Wire and Electric Corp.)*, 144 N.L.R.B. 1089 (1963), *enf'd in pertinent part sub nom, New Power Wire and Electric, Inc.* v. *NLRB*, 340 F. 2d 71 (2d Cir. 1965); *Local 861, IBEW (Brownfield Electric, Inc.)*, 145 N.L.R.B. 1163 (1964); *Plumbers Local Union No. 307 (Meyers Plumbing)*, 146 N.L.R.B. 888 (1964).

Likewise here, it is undisputed that plaintiff's work remained uncompleted throughout the period when the picketing took place, that he made several returns to the job site to do further work, and that the Union could not predict with any degree of accuracy when he might return. Therefore, the court finds that although the picketing and handbilling did occur during the plaintiff's temporary absences, this alone does not evidence a violation of Section 8(b)(4), the *Moore Dry Dock* standards otherwise having been observed by the Union.

Plaintiff secondly contends that a violation of the section can be found, despite the Union's compliance with the *Moore Dry Dock* standards, based upon the fact that the Union picketing was restricted to the Pappas job site and did not extend to his regular place of business or other locations where he worked. While the failure to picket the primary employer's regular place of business may be considered as evidence of a union's illegal objective, it is clear that that failure alone will not be conclusive of the question. *Teamsters Local 859* v. *NLRB*, 229 F. 2d (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972, 76 S. Ct. 1025 (1956); *NLRB* v. *Teamsters Local 968*, 225 F. 2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914, 76 S. Ct. 198 (1955). Particularly is that so where, as here, the nature of the primary employer's work is ambulatory. *Plauche Electric, Inc., supra.* While the evidence did not clearly establish how much time the plaintiff spent at his regular place of business, the fair inference from that evidence presented was that it was only negligible. Thus, although the Union's picketing did not extend to the plaintiff's place of business, the court does not find that this failure evidences any illegal objective.

Plaintiff also contends that the court may find evidence of a violation in that employees of neutral employers left the job site. The short answer to this contention is that the evidence wholly failed to establish that any employees left the job site after the picketing commenced. In fact, the evidence clearly established the opposite — that is, no employees of neutrals left, and work continued as usual despite the presence of the Union pickets.

B. UNLAWFUL COERCION OF PAPPAS

As to Counts II and III of the amended complaint, which allege violations of Section 8(b)(4)(ii)(B), the court finds that there was insufficient evidence to tie to the Union either the anonymous phone call to Pappas or the destruction of the electrical work. At most, the evidence established only a suspicion that the Union was involved in these activities, given the past inharmonious dealings between it and plaintiff. However, a suspicion is not evidence, nor is a substitute for proof. The court, therefore, finds that the plaintiff has failed to meet his burden of proof as to these counts of the complaint.

PENDENT STATE LAW CLAIM

Count IV of the amended complaint alleges that the defendant union, "through its agents or employees, wantonly, willfully or maliciously destroyed plaintiff's prop-

erty." This state law claim, as earlier determined, is within the pendent jurisdiction of this court. *United Mine Workers* v. *Gibbs, supra.*

In *Gibbs* the Supreme Court made it clear that a union could not be held liable upon such a pendent state law claim unless it was established by "clear proof" that the union authorized the unlawful act, participated in it, or ratified it after actual knowledge of it, as required by Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106. "Clear proof" was defined as more than a preponderance of the evidence, but less than the criminal standard of beyond a reasonable doubt. Plaintiff here has missed that standard by a wide mark. Plaintiff failed even to meet the preponderance of the evidence test. As has been earlier noted, the most plaintiff established was a suspicion that the Union might have been involved in the destruction of the electrical work. Under *Gibbs* and Section 6, mere suspicion is not sufficient.

JUDGMENT

Accordingly, it is the judgment of this court that plaintiff take nothing by way of his complaint and judgment is hereby entered in favor of the defendant.

Entered this 19th day of November, 1975.

JESSE ESCHBACH
United States District Judge